

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Timothy Darrell Davis,) Civil Action No.: 4:11-3263-MGL
)
 Petitioner,)
)
 v.) **OPINION AND ORDER**
)
Michael McCall, Warden,)
)
)
 Respondent.)
)

This matter is before the court upon the recommendation of Magistrate Judge Thomas E. Rogers, III, that Petitioner Timothy Darrell Davis' petition for a *writ of habeas corpus* pursuant to 28 U.S.C. § 2254 be dismissed for failure to prosecute pursuant to Fed. R. Civ. P. 41(b) and that Petitioner's Motion to Stay his habeas petition be denied. (ECF No. 52.) The Magistrate Judge filed his Report and Recommendation on June 27, 2012. (ECF No. 66.) At the time the Report and Recommendation was filed, Petitioner had not yet responded to Respondent's motion for summary judgment. In accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), on May 2, 2012, the Court entered an order explaining that a motion for summary judgment had been filed and further advising Petitioner of the possible consequences of failing to file a response to the motion. (ECF No. 56.) On June 6, 2012, Petitioner filed a motion for an extension of time to respond to the pending motion for summary judgment. (ECF No. 61.) The Court granted Petitioner an extension until June 22, 2012. (ECF No. 62.)

On July 2, 2012, Petitioner filed his response to the motion for summary judgment. On July 12, 2012, Petitioner filed his objections to the Magistrate Judge's Report and Recommendation. (ECF No. 71.) Recognizing that Petitioner is proceeding pro se and in

an abundance of caution, on October 17, 2012, this court directed the Clerk to remand this cause of action to the Magistrate Judge for consideration of Petitioner's opposition to Respondent's Motion for Summary Judgment, thereby declining to accept the recommendation of the Magistrate Judge in its entirety. (ECF No. 76.) The court is now left to consider the remaining portion of the Report and Recommendation.

On April 16, 2012, Petitioner filed a motion to stay his petition until "his currently pending PCR claims, in process at Greenville County Court of Common Pleas, becomes fully heard and/or adjudicated to the State's highest Court." (ECF No. 52 at 3.) Petitioner further "prays that this Court also consider allowance to later add the PCR matter back to the original habeas action by operation of amendment." (ECF No. 52 at 3.) Respondent filed a response in opposition to the Motion to Stay (ECF No. 53) and Petitioner filed a reply to the response on May 17, 2012. (ECF No. 60.) The Magistrate Judge considered this motion and the responses in his Report and Recommendation and recommended Petitioner's Motion to Stay be denied because Petitioner amended his petition to delete the unexhausted claim so that it would not be a mixed habeas petition containing both exhausted and unexhausted claims, and further, Petitioner has failed to show "good cause" for failing to exhaust his state remedies under the standards of *Rhines v. Weber*, 544 U.S. 269 (2005). (ECF No. 66 at 3.)

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. See *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the court may

accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

Petitioner filed timely objections to the Magistrate Judge's Report and Recommendation. (ECF No. 71.) The court has considered the objections concerning Petitioner's Motion to Stay. Upon review, the court finds that Petitioner largely restates the arguments made in his initial filings in support of the Motion and reply in support. The arguments are conclusory and would not make the necessary showing needed to obtain a stay, even if Petitioner had not already amended his petition to withdraw the unexhausted claim. Petitioner's objections fail to add any new arguments that would make this court reject the Magistrate Judge's Report.

Accordingly, the court adopts the Report and Recommendation to the extent it recommends Petitioner's Motion for Stay (ECF No. 52) be denied for the reasons stated therein. The court declines to accept the remainder of the Report and Recommendation, particularly as it recommends dismissal of this matter for failure to prosecute. Petitioner's Motion for Stay and Abeyance for Writ of Habeas Corpus (ECF No. 52) is hereby DENIED. This matter is remanded to the Magistrate Judge for consideration of Petitioner's opposition to Respondent's motion for summary judgment (ECF No. 68) in accordance with this court's previous order. (ECF No. 76.)

IT IS ORDERED.

s/Mary G. Lewis
United States District Judge

November 26, 2012
Spartanburg, South Carolina